# TRUST REGULATION

BY ALBERT FINK

## I

In view of the apparent unanimity of opinion among many of the leaders of political, industrial, and financial thought, that the time has now come when the National Government should assume some kind of definite control over "Monopolistic Trusts," and among other things regulate the prices at which commodities shall be sold, a casual investigation of this suggestion may not be amiss. The subject would seem, naturally, to divide itself into the following inquiries: 1. What power, if any, exists in the premises? 2. The expediency of the exercise of this power. 3. The solution. It will be the purpose of the present article to deal primarily with the question of power.

The proponents of Federal legislation, looking to the regulation of the prices of trust-controlled or quasi-controlled commodities, seems to rest their belief in such constitutional power of Congress upon a presumed analogy between the fixing of the prices of commodities and the adjustment of transportation rate. In the December, 1911, number of The North American Review Mr. Andrew Carnegie makes the suggestion in the following significant statement: "An industrial court passing upon fair prices as the Interstate Commission passes upon railway rates is all we need." In his "Trust article," published in the *Outlook* of November 18th, in speaking of the extent of the desired control, Colonel Roosevelt expressed the same sentiment: "This control should, if necessary, be pushed in extreme cases to the point of exercising control over monopoly prices, as rates on railways are now controlled." To the same effect was Judge Gary's testimony before the Stanley Investigating Committee.

The argument upon which these suggestions are made to rest seems syllogistically stated to be about as follows: To fix the rate of transportation is the same as to fix the price of commodities. Congress has power to fix the rate of transportation. Therefore, Congress has power to fix the price of commodities.

If by the minor premise is meant a power to prescribe a fixed, definite rate, it may well be questioned. While it seems to be the general impression among the members of the American Bar that power exists in the National Government to clothe the Interstate Commerce Commission with rate-fixing authority, it is believed that the last word upon this subject has not yet been said. Common carriers by reason of the public character of their business have ever been prohibited from charging unreasonable rates. Thus, even in the absence of statute, carriers may not enforce excessive charges or discriminate unjustly between shippers or markets. The enforcement of this duty by national legislation, and the prohibition of unreasonable or unjust rates or discrimination so far as Interstate Commerce is concerned, may be admitted. But it by no means follows that because Congress has the right to prohibit unreasonable rates it has the power to prescribe or fix rates above or below which the carrier may not charge.

To say that a rate is unreasonable is one thing. To say that it shall be a given fixed amount is quite another. In the one case the exercise of the power is regulative and clearly within the constitutional grant; in the other, it may be the taking of private property without compensation. As was said in the Railroad Commission cases:*

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

Nor is it an answer to this objection to affirm that it cannot be assumed that the rate fixed by the Commission will be unreasonable, and that as to all reasonable rates so fixed the carrier is deprived of nothing, in that it is permitted to charge that which the law allows—a reasonable rate. For inasmuch as there is in many cases a margin above

*116 U. S. 307

which the rate becomes unreasonably high as against the shipper, and below which confiscatory as against the carrier, it is the obvious privilege of the latter between these extremes to fix its own charge. The prescription of a definite rate in such cases by the Commission would seem to infringe this prerogative. And so, as a rate which is perfectly reasonable to-day may be and frequently is, through changing conditions, unreasonable next week or month, it follows that any law granting to a commission the power to fix such rates as it deems proper, and continue them in force for any given length of time, is a law which will, in its operative effect, result in the imposition upon carriers of a rate admittedly unreasonable.

By way of illustration: A rate of $1.25 on lemons from California to the Eastern seaboard is reasonable to-day. Next month the increase in the value of the product, or other changing conditions easily imagined, renders this rate unreasonably low. Yet the carrier may not increase the rate because it has been fixed by a commission, and is therefore compelled to accept for its services a compensation admittedly unjust. Such a law would seem to take from the carrier its property without compensation. And if it be conceded that a carrier has the right at all times to charge reasonable rates, any law which limits and violates this right must necessarily *pro tanto* be confiscatory and unconstitutional.

Nor is the objection answered by saying that the unreasonable rate shall be enforced for only such time as will enable the fact of its reasonableness to be determined, unless provision is also made for reimbursing the carrier should the rate fixed by the commission prove unreasonably low. For if it should transpire that the contention of the carrier was eventually sustained, very obviously has the latter been deprived during the interim of that to which it was justly entitled. In this connection it is well to remember that of the cases which have come to the courts upon appeal the Interstate Commerce Commission has been reversed in an overwhelming majority, and that had its orders been enforced in the Maximum Rate Cases, pending appeal, it would have cost the interested carriers over $3,000,000 per annum, not one cent of which would they have been able to recover.

The fact that the amendment of June 29, 1906, carried into that of June 18, 1910, permits the Commission, under certain defined circumstances, to " Prescribe what will be the just

and reasonable rate or rates . . . to be thereafter observed in such cases as the maximum to be charged," and to make an order which may be continued in force for two years " that the carrier . . . shall not thereafter . . . collect . . . in excess of the maximum rate . . . published " proves nothing, for, it is submitted, that if the question of the constitutional power of Congress to enact such legislation in the absence of a provision for reimbursement of the carrier in the event of an ultimate determination that the rate fixed was confiscatory has ever been submitted to the Supreme Court, that tribunal has at least never decided it.

Nor has the Supreme Court ever yet sustained the constitutionality of any law attempting to confer an absolute rate-making power upon the Commission. In the " Social Circle "* and " Maximum Rate Cases,"† decided in 1896 and 1897, such power was denied the Commission under the Act of 1887, though the constitutional point was not raised. And the question as to the power of even Congress itself was expressly reserved in the Northern Securities Case.

Quite recently a unanimous court in commenting on this power said.‡ "A power which, if it obtains, would open a vast field for the exercise of discretion to the destruction of the rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply." This decision was followed October 5th by that of the Commerce Court§ (also unanimous), holding void an order of the Commission reducing a rate when the reduction was not based upon any unreasonableness of the prior charge, but upon an assumed authority to protect an industry from foreign competition.

The foregoing considerations have put entirely out of view the question as to whether or not, conceding in Congress the power to prescribe rates which shall be charged in the future, Congress would yet have the power to delegate such legislative functions to a commission, for as was said in the "Maximum Rate Case": "It is one thing to inquire whether the rates which have been charged and collected are reasonable—and that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future —that is a legislative act." Whether or not the exercise of

* 162 U. S. 184. † 167 U. S. 489.
‡ So. Pac. *vs.* I. C. Co., 219 U. S. 433, Feb. 20, 1911.
§ 190 Fed. 591.

such power by a commission would be the exercise of purely legislative functions or merely " the filling up of details " under a general provision remains to be determined. Though it is to be noted that the Court said: " Congress might itself prescribe the rates or it might commit to some subordinate tribunal this duty." But this question was not involved in the decision, and the language was used only in relating one of the modes of regulation suggested to and considered by Congress during the passage of the Interstate Commerce Act.

But this is not all. The Commerce Clause of the Constitution is limited by other provisions as they have been judicially construed. And it has been one of the settled doctrines of that instrument that Congress cannot enforce upon the Courts legislative or quasi-legislative administrative functions by the grant of either original or appellate jurisdiction. If a discretionary rate-making power were exercised either by Congress itself or a Commission, here would be a legislative act incapable of review by the Court, except upon the sole ground of its being confiscatory as against the carrier, or extortionate or discriminatory as against the shipper. In all cases where the rate prescribed was neither confiscatory nor extortionate the action of the Commission or Congress must be final and not subject to review by the courts, because the question sought to be reviewed would be neither of law nor of fact, but one wholly within the legislative discretion. The net result would be that in those cases in which Congress, or its Commission, fixed a rate not confiscatory, and yet lower than the carrier might fix without violating the inhibition against extortion, there would be a taking of the property of the carrier by the legislative branch of Government, without possibility of review by the courts, and in apparent violation of both the " Compensation " and " Due Process of Law " clauses of the Fifth Amendment.

As was well said by Senator Bailey in an address before the New York State Bar Association:*

" If the Legislature can say what is a just compensation for a railroad service and prevent the railroad from resorting to the courts to challenge the reasonableness of the rate prescribed, then by the same process of reasoning the Legislature can fix the value of any property which it may authorize the railroad to condemn and deny its owner his day in court."

* January 20 1910.

Again, it is to be remembered that by the sixth paragraph of the ninth section of Article I. of the Constitution, Congress is prohibited from giving any preference by "*any regulation of commerce*" to the ports of one State over those of another. So long as the carriers are permitted to fix their own rates limited only as to their reasonableness any preference given one port over another is the act of the carrier, and therefore not violative of this clause. But as soon as the Congress, acting either directly or through its Commission, shall assume the rate-making power the regulation ceases to be the act of the carrier and becomes that of Congress. It is true that the late Mr. Justice Moody while Attorney-General expressed a contrary opinion, holding in effect that rates which were in and of themselves reasonable, just, and *impartial,* though fixed by legislative authority, would not be violative of this clause even though they entailed a varying charge per ton per mile. But Victor Morawetz seems to have sustained a different view.* And a careful reading of the Attorney-General's opinion conveys the impression that his conclusion was made to rest upon an assumption that such rates would not in fact be preferential, and so they would not, if "*impartial*" in the sense that they were the same; but that they would not and could not be the same must be conceded, and it is "*any*" preference which is prohibited. To sustain the contention the provision must be construed to mean any *unreasonable* preference. And when it is remembered that the construction of an American freight tariff upon a mileage basis so as to keep the markets of one section of the country open to those of another, and at the same time admit of the carrier's earning even the interest on their bonded indebtedness, is an utter and absolute practical impossibility, it is not quite observed how a rate-making power could be exercised by the Government without violating both the spirit and the letter of the clause in question.

Nor can the matter be disposed of as in a recent decision of the Land Department,† holding that the granting of the right of way for ditches over the public domain for "manufacturing purposes" did not include in its provisions ditches for the generation of electric power, because electricity was "*unknown*" at the time of the passage of the act.

* *Harvard Law Review,* June, 1905.

† 38 L. D. 302.

But granting *arguendo* the minor premise or assuming that only such regulation of the prices of commodities is desired, as is now exercised with reference to transportation rates — that is, the establishment of a maximum beyond which the charge may not go—does it follow that because the power exists in the one case it exists in the other? In other words, is the fixing of the rate of transportation the same as and equivalent to the fixing of the price of commodities?

Undoubtedly an argument, apparently irresistible in logic, can be constructed to establish the affirmative of this proposition, for it will at once be pointed out that the service rendered by a railroad in the transportation of freight or passengers is in fact a commodity sold by the carrier. From this the conclusion will be drawn that if the power is extant in the one case it must necessarily exist in the other. And if it be suggested that in the one case Congress is dealing with the instrumentalities of commerce, while in the other with its subjects, there will be three answers, each apparently equally conclusive. First, it will be said that the power extends to the one as well as to the other. Secondly, that the commodity of the carrier, its service, is as much the subject of commerce as other merchandise offered for sale; and lastly that the great industrial corporations engaged in the manufacture and interstate distribution of commodities are as much the instrumentalities of commerce as the carriers thereof. Then if it be suggested that the price at which the commodities are sold forms no part of the true definition of commerce, but is merely one of its incidents, the reply will be that such is equally the case with the price at which the service of carriage is performed. Nor can any discrimination be observed between the price at which the commodity is sold and that at which it is carried in their relation to commerce. Both are equally direct.

The result of this seemingly complete analogy must be that either the right to regulate the price at which commodities may be sold must, in fact, exist or the power over transportation rates must have been erroneously assumed. The latter is believed to be the case. The error, if such it be, was probably begot of the urgent necessities of the situation, as well as of a failure to clearly distinguish between powers granted to the Federal Government and those reserved to the States and between commerce and its incidents. At the very threshold of the investigation appears a difficulty in

pointing out the origin of the error by reason of the peculiar and interesting fact that the precise question seems never to have been presented to the Court for determination. The power of the general Government to inhibit carriers from levying unreasonable charges seems to have been assumed as a matter of course and to have been acquiesced in by bar and bench without protest.

The history of the origin of this assumption seems to have been about as follows: Prior to 1876 the carriers assumed the position that they were immune from any such governmental interference; that their commodities—that is, the price of their service—was private property which they might sell for such price as they saw fit. By the judgment in the "Granger Cases" the contrary was established, though by a divided court, Mr. Justices Strong and Field dissenting. But the decision did not involve any question of Federal control, and was made to rest upon the principle that such power was one of the inherent prerogatives of sovereignty and therefore within the *police power* of the States. Not only this, but in one of the cases presented the question was as to the right of the State to provide by law a maximum of charge for rates of transportation upon property taken up outside the State and brought within or taken up inside and carried without, both propositions, of course, involving interstate traffic. Following the decision in Munn *vs.* Illinois, the Court sustained the contention of the State as a legitimate exercise of the police power, resting the pronouncement in part upon the principle that the matter was local in its nature and that the State might regulate at least until such time as Congress had taken action in the premises.

When the point was next examined in the Wabash Case* a divided Court† in effect reversed this ruling, holding that inasmuch as the rule there stated would work endless confusion in the event of different States prescribing contrary rates for the same transportation, such a construction could not have been within the purview of the Constitution. The Court then established the doctrine that as to all intrastate business the power of regulation was with the State; as to all interstate traffic, with Congress. In 1887 the Interstate Commerce Act was passed, and from that time on it

* 1886—118 U. S. 557.

† Mr. Justices Bradley and Gray and the Chief Justice dissenting.

seems to have been conceded without question that the rate-fixing power was one properly deducible from the Commerce Clause.

Thus was begotten the notion that there exists in Congress from this clause, so far at least as carriers of interstate traffic are concerned, the same power as is inherent in sovereignty, by reason of its *police power,* a conception which, no matter how justified by expediency, is believed erroneous in principle and an invasion of the powers reserved to the States. And this view is much fortified by a consideration of the circumstances surrounding, and the purposes and motives which compelled the incorporation of, this clause into the Constitution. The primary consideration of the grant was to prevent discrimination by one State against the commerce of another, and as was said by Mr. Madison:*

"It was intended as a negative and a preventive provision against injustice amongst the States themselves, rather than as a power to be used for the positive purposes of the general Government, in which alone, however, the remedial power could be lodged."

But the correctness of the doctrine is of more historical than practical interest, for even if its propriety as to carriers be conceded it does not follow that it must be extended beyond that point. A construction which is demanded by some imperative governmental necessity need not be pressed beyond that precise situation—*a fortiori* is this the case when such extension would involve a conflict with other principles and entail a further invasion of the power reserved to the States. There are, perhaps, many principles which, carried to the limit of their logical conclusions, would result in absurdities or utterly destroy the equilibrium of our dual form of Government. Thus, that under discussion would vest in Congress a power to prescribe the maximum wage beyond which a locomotive engineer might not charge, for no distinction can be made in logic between the service rendered by him and that of the engine he drives. Both are engaged in interstate commerce, both are the agencies thereof, and their relations thereto are identical. Yet the most latitudinarian construction would hardly contend for such power under the Commerce Clause. So, it is believed, that if it can be shown upon principle and authority that the right to regulate the prices of commodities cannot be con-

* Letter to Cabell, February 13, 1829.

stitutionally sustained, such will be the holding, irrespective of however perfect may be the supposed analogy to the power to prescribe rates of transportation, if such right indeed exists.

"Commerce"—as defined by the great Chief Justice in Gibbons *vs.* Ogden (a definition which, by the way, has been neither enlarged, modified, nor changed since the pronouncement of that judgment) "is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse." How can the price at which a given article is sold be said to be "commerce" within this definition. Is it [the price] traffic or intercourse? Is it any part of the branches of intercourse between nations or parts of nations? In the sale of commodities it is the negotiations, the transmission, the delivery, which is commerce, not the particular inducement, consideration, motive, or price upon which parties may have acted. The particular price at which a thing is bought or sold cannot with any show of reason be said to be commerce, but at most can be held as merely one of the incidents thereof.

But it is not to the mere incidents that the Commerce Clause extends, for as was well pointed out by the present Chief Justice:*

"There is a difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise, and to all the contracts which might be made in the course of its transaction, *that power would impress the entire sphere of mercantile activity in any way connected in trade with the States and would exclude State control over many contracts purely domestic in their nature.*"

And as said by Mr. Justice Holmes,† "Commerce depends upon population, but Congress could not on that ground undertake to regulate marriage and divorce." And by Mr. Justice La Mar:‡

"The buying and selling, and the transportation incident thereto, constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future,

* 150 U. S. 655. † 24 S. C. R. 468. ‡ 128 U. S. 1.

it is impossible to deny that it would also include all productive industries that contemplate the same thing. *The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry.*"

The confusion upon the subject seems to arise from a mistaken impression that anything connected therewith is commerce. Such is not the case. The insurance of merchandise is very intimately connected therewith, but it has been held that a contract of insurance, even though the parties thereto be domiciled in different States, is not commerce.* So where a State had chartered a railway company upon condition of payment by the carrier of a proportion of its receipts from interstate freight (and the argument was advanced that here was a burden upon commerce) the contrary was held.† So a State statute forbidding the consolidation of competing carriers engaged in part in interstate traffic was upheld because not directly affecting commerce.‡ And a contract in restraint of trade between persons engaged in selling cattle imported from different States and destined for distribution to others was held not within the provisions of the Sherman Act because not interstate commerce, and therefore not within the regulating power of Congress.§ The direct purpose of the consolidation of the refineries in the Knight Case¶ was the control of the manufacture of sugar. The monopoly was admitted to the extent of ninety per cent. of the entire business conducted in the United States. Nevertheless, the case was held not within the Sherman Act because not interstate commerce. The Court, speaking through Chief Justice Fuller, said:

"Contracts, combinations, or conspiracies to control domestic enterprise, manufacture, agriculture, mining production in all its forms, *or to raise or lower prices or wages* might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an *indirect result,* however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries whose ultimate result may affect external commerce, *comparatively little of business operations and affairs would be left for State control.*"

* 8 Wall, 168 † 21 Wall, 456. ‡ 161 U. S. 677.
§ 171 U. S. 578. ¶ 156 U. S. 14.

In the Green Case* an indictment charging the creation of a monopoly in violation of the Sherman Act was held invalid upon its face because it did not involve interstate commerce. Circuit Judge, afterward Mr. Justice Jackson, in defining commerce, said:

"Neither the production nor manufacture of articles or commodities which constitute the subjects of commerce, nor the preparation for their transportation prior to the commencement of the actual transmission thereof, constitutes that interstate commerce which comes within the regulating power of Congress, *and after the termination of transportation, and the mingling thereof in the general mass of the property in* the State of destination, the sale, distribution, and consumption thereof forms no part of interstate commerce."

And in commenting upon the power of Congress:

"But Congress certainly has not the power or authority under the Commerce Clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, for the acquisition, control, and disposition of property. *Neither can Congress regulate or prescribe the price or prices at which such property or the products thereof shall be sold by the owner or owners, whether corporations or individuals.*"

So tested by the decisions of the Court in cases arising under the taxing power of the States where it has been suggested that the particular tax in question casts a burden upon commerce, it is not quite observed how the power contended for can be sustained. That States may not tax interstate commerce has long been established, even though a similar tax is levied on intrastate commerce. Nevertheless, it has been held that a State may tax property within its borders, though manufactured for shipment beyond, or merchandise imported from another State after it has been incorporated into the general mass of the property of the taxing State for the purposes of use or sale therein, and may even tax property temporarily within its borders for the expenditure of work and labor thereon.

There seems to be little similarity between the power necessary to regulate the prices of commodities sold or offered for sale by private corporations operating under State charters and that sustained in the so-called trust decisions. The principle upon which these cases have been decided is that the acts complained of throttled competition, that free and untrammeled competition was necessary to a healthy commerce, and that anything which tended to embarrass

* 52 Fed. 105.

the former was a restraint of the latter. In other words, *a restraint of competition was a restraint of trade* within the inhibition of the Sherman Act. This may be conceded *arguendo,* but it does not follow that the fixing of prices of commodities would destroy that restraint of competition which in itself is believed a restraint of trade. On the other hand, it would appear that such action would entail the very opposite effect. *The regulation of the prices of commodities does not tend either directly or indirectly to prevent restraint of trade.* If the American Sugar Company, having a virtual monopoly of refined sugar, is prohibited by law from charging more than a fixed price, say three cents per pound, how does this destroy or tend to destroy restraint of competition?

The competition has already been destroyed *by the acquisition of the monopoly.* Certainly the ten per cent. of independent competitors would not be benefited by prescribing a maximum beyond which the trust could not charge. As the minimum charge will secure the trade, so the fixing of a maximum merely defines the price beyond which the trust cannot sell. But how does this assist the independent? Must he not meet or reduce this price in order to secure the business. As the competition is not destroyed by the selling at a maximum by the trust, but, on the other hand, by underselling, so the remedy must necessarily be *the fixing of a minimum under which the trust could not sell* rather than a maximum beyond which it might not charge, this minimum to be such as to afford competitors a reasonable profit. Thus, then, we have a Commission which, after full hearing, determines that though refined sugar is being sold at a profit at three cents in the open market, this price is so low that it cannot be successfully met by independent competitors. That five cents would be a price at which the independents could realize a reasonable profit. A minimum of five cents is, therefore, fixed by the commission as a figure below which sugar may not be sold. Obviously the law must be uniform in its operation, and affect both the trust and its competitors, for it can hardly be conceived that Congress would have power to tie the hands of one competitor under the Commerce Clause in order to permit another to reap the profits. Thus we have Congress, through its Commission, under the plea of a regulation of commerce, legislating into an article of ordinary necessity a fictitious value in

excess of that which it really possesses: a tax levied upon the entire community to be offered as a bounty to those who desire entering into competition with the Sugar Trust. And inasmuch as many of the articles of necessity are more or less affected with trust ownership, any general law upon the subject must embrace within its provisions a large proportion of the merchandise of the country now forming the subjects of interstate commerce, thus creating a market based not upon the law of supply and demand, economic conditions, or the cost of production and distribution, but solely upon a fictitious value which in the minds of the members of a Commission is sufficient to enable an independent to compete with such trust-tainted merchandise. *Surely the mere statement of the case should be sufficient.*

Finally, if it be admitted that the price at which the article is sold or offered for sale be commerce, it certainly is not interstate, for the sale of the commodities takes place either in the State of its manufacture prior to its transportation and when it is a part of the general property of the State wherein it is located and thus subject to the local law, or else it takes place in the State to which it has been transmitted for the purpose of distribution, use, and sale, and after it has become incorporated into the general property of that State and subject to its local law. *In neither case can it be quite observed how the sale or the price could be interstate commerce.*

In conclusion, let it be remembered that it is not contended that when any combination or individual secures such control over the manufacture or distribution of a given commodity as to acquire monopoly or quasi-monopoly therein the business remains of a private character. On the contrary, it is believed that under such circumstances the industry becomes as public in its nature and functions as that of common carriage. Nor must it be assumed that it is contended that there is no inherent power in sovereignty to regulate such monopoly, or to prescribe maximum charges beyond which such corporation or individual may not go. Monopolies have ever been held illegal and odious even at common law, and the sovereign power to establish maximum charges and the kind, character, and extent of service to be rendered has long been recognized and fully settled in this country.

The point is that such power is distinctively police, is

reserved to the States, and not within any of the powers granted to the National Government. It is distinct both in its operation and effect, as well as in the principle upon which it rests, from that granted to Congress under the Commerce Clause.

One remaining question suggests itself as worthy of some comment. Can the Federal Government accomplish by indirection that which it could not do directly? That is to say, could corporations engaged in interstate commerce be compelled to renounce their several State charters and incorporate under a general Federal statute, so as to bring them within the desired control by virtue of the provisions of the new enabling act? Such a suggestion was made by Mr. Samuel Untermeyer in a most interesting article in the REVIEW of July, 1911, where it was said:

> "It is now axiomatic that the power to regulate commerce includes the power to control all the agencies and instrumentalities of commerce. Congress can at any time take unto itself the sole right to charter those engaged in interstate commerce."

This, of course, assumes the power of Congress to prohibit any person or corporation from engaging in interstate or foreign commerce except upon the terms and conditions imposed by it, which in its last analysis amounts simply to this: *the power to regulate includes the power to prohibit.* Here it might be pertinently asked why such power was not granted in terms so that the clause would have read "*regulate or prohibit,*" etc. Certainly regulation does not mean prohibition and is in no sense interchangeable therewith. Prohibition is the larger term, and if the delegation of such power was intended, no sufficient reason can be assigned for the use of the lesser instead of the more comprehensive. It cannot be said that the "fathers" were accustomed in their choice of words to use one when they intended another, and certainly no one familiar with the history of that age would contend that it was ever within the intention of the members of the Constitutional Convention, or the ratifying States, to invest Congress with a power which might by any possible construction enable a general and absolute prohibition of commerce either among the several States or with foreign nations, or put it in the hands of any possible combination of agricultural States to legislate against the interests of those chiefly engaged in commerce. It is true that

in the Lottery Cases* it was held that the power to regulate might in certain instances, such as the one then under consideration, include the power to prohibit, but the judgment was by a divided court† and the logic was clearly with the minority. And even in the opinion of the majority the language is most guarded, and with the evident purpose of preventing the extension of the doctrine beyond the facts of that particular case, where the traffic complained of had been locally legislated out of most of the States, was admittedly a general nuisance and obnoxious to the moral sense of the entire nation.

But as to the argument that such power necessarily carried with it the power to exclude from commerce any article, commodity, or thing of whatever kind or nature or however useful or available, the Court said:

"It will be time enough to consider the constitutionality of such legislation when we must do so. The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."

If there are any privileges secured by the Constitution to the citizens of the several States, whether they be individuals or corporations, it would certainly seem that among those guaranteed would be found the right to engage in commerce among the States or with foreign nations at least in all lawful, useful, and necessary merchandise. If the people of this country desire to give to their Congress powers in addition to those already possessed, clearly the grant should be made by constitutional amendment and not by judicial construction.

* 23 S. C. R. 321.

† Chief Justice Fuller and Mr. Justices Brewer, Shiras, and Peckham dissenting.

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